

OFFICE OF SPECIAL MASTERS

No. 04-1039V

Filed: June 16, 2005

CARLA and KEVIN LONG, legal
representatives of a minor child, Colin James
Long,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES

Respondent.

Unpublished

To be posted on court's website¹

ORDER DEFERRING RULING ON TIMELINESS ISSUE

Respondent filed a Motion to Dismiss on September 17, 2004, arguing that this petition should be dismissed because it allegedly was not timely filed. I hereby defer ruling on that motion, for the reasons set forth below.

The petition alleges that Colin suffered a *number of injuries* -- *i.e.*, "Cyclic Vomiting Syndrome, ADHD, Asperger Syndrome, High Blood Pressure, Kidney Blockage, Food Allergies, and Mercury Poisoning" -- as a result of his DTP vaccination of August 21, 1990. The petition itself -- *see* paragraphs 7, 8, 9 and 10 -- indicates that with respect to some of these injuries -- *i.e.*, the Cyclic Vomiting Syndrome, ADHD, high blood pressure, and kidney blockage -- the first symptom of each injury occurred more than three years prior to the filing of this petition, so this petition would be untimely filed as to such injuries. As to the other alleged injuries -- *i.e.*, "Asperger Syndrome, Food Allergies, and Mercury Poisoning" -- however, it is not clear when the first symptom of those alleged injuries occurred. The respondent's motion makes no attempt to point out when the first symptom of each injury occurred.

¹Because this document contains a reasoned explanation for my action in this case, I intend to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, as provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, this entire document will be available to the public. *Id.*

To be sure, respondent does point to medical records that indicate *some abnormalities* in Colin prior to June 21, 2001 (the petition was filed on June 21, 2004²). But the records do *not* make it clear whether the first symptom of Colin's Asperger Syndrome, for one, took place prior to June 21, 2001. Note, for example, that the diagnosis of Asperger Syndrome may not have been made until 2002. (See Exhibit 10, p. 54 of the initial petition). Respondent simply has not pointed to any evidence indicating that Colin's pre-2001 difficulties were, in fact, manifestations of Asperger Syndrome.

Of course, if and when the petitioners ultimately attempt to prove "causation," and supply medical records, at that time it will then become clear when the first symptom of each of Colin's disorders occurred. We can *at that time* assess whether the petition was timely filed. There is no need to do so at this time. (I note, however, that in cases in which the available medical records *do* indicate that the first symptom predated the filing of the petition by more than three years, I will continue to dismiss such cases, as I have in the past. See, e.g., *Weinstein v. HHS*, No. 02-2059V, 2004 WL 3088663 (Oct. 25, 2004), *aff'd sub nom Hebert v. HHS*, ___ Fed. Cl. ___ (2005); *Tucker v. HHS*, No. 03-0346V, 2004 WL 950012 (Fed. Cl. Spec. Mstr. Apr. 15, 2004); *Kinsala v. HHS*, No. 03-1289V, 2004 WL 828459 (Fed. Cl. Spec. Mstr. Mar. 19, 2004).)

Finally, I reiterate to the petitioners that, as set forth in my "Notice" sent to them on July 6, 2004, if they desire to attempt to prove, on their own, that Colin's Asperger Syndrome or any other of his conditions was vaccine-caused, they may do so at any time. On the other hand, they may, if they wish, continue to elect to defer any proceedings on their case, while awaiting the outcome of the Omnibus Autism Proceeding. Unless I hear otherwise from them, I will assume that they continue to wish to defer proceedings and await the outcome of the Omnibus Autism Proceeding.

George L. Hastings, Jr.
Special Master

²A document entitled "Amended Petition" was filed June 29, 2004.